BRIEF OF GERRITSEN BASIN DEVELOPMENT CORPORATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Gerritsen Basin Development Corporation is concededly the owner of a 93/640th interest in the land remaining in the Patent that was granted by Governor VanTwiller to Hudde and Gerritsen in 1636 and, according to the Gerritsen Basin Development Corporation's contention, it is the owner of the entire balance of the property that remains in the said Hudde and Gerritsen Patent.

The Dutch grant to Hudde and Gerritsen was confirmed by the Colonial Governor Nicholls to Elbert Elbertsen, a successor in interest to Hudde and Gerritsen.

A dispute arose between Elbertsen and the Town of Flatlands, a predecessor of the City of New York, regarding the extent of the Hudde and Gerritsen Patent as confirmed by Governor Nicholls, and the matter was submitted to arbitration. Five representative men were chosen as Arbitrators and in 1696 they rendered a decision, which was entered in the Flatland Town Records, which if it had been followed in the proceedings in the instant case would have definitely confirmed title to the lands that were taken by the City of New York, in the Petitioner Gerritsen Basin Development Corporation.

The Patent involved in these proceedings was also before the Courts of New York State in the Gerritsen Marine Park case (248 App. Div. 240). In that case the Court held:

> "On all the proof, a complete consideration of which would expand this opinion to an inordinate length, we are of opinion that it has been established with reasonable certainty, that the Stromkill was the Kill described in the Patent and that the lands that are claimed by the appellant Gerritsen Basin Development Corporation were within its confines" (p. 247).

In the proceedings in the instant cases the Trial Court heard testimony of a Dutch translator, one Van Lear, who testified that the findings of the Arbitrators of 1696 were incorrect; that they did not properly interpret the Dutch Hudde and Gerritsen Patent and that Governor Nicholls' confirmatory Patent also was incorrect in its description, and who further testified that the Appellate Division in Gerritsen Basin Marine Park case was wrong in its interpretation of the patent.

The Trial Court following the oral testimony of Van Lear held that the original interpretation of the Patents were incorrect, although the same translation of the Patent was before the Courts in the prior proceedings.

The Appellate Division of the Supreme Court, each of the five justices writing a separate opinion, Mr. Justice Haggerty dissenting, upheld the Trial Court and reversed its unanimous decision in the former proceeding (258 App. Div. 191). By so doing, it set aside the English confirmatory Patent and also set aside the unanimous findings of fact and conclusions of law of the 1696 Arbitration on the bounds of the said Hudde and Gerritsen Patent. It also ignored many historical facts and determinations supporting the confirmatory Patent, which are set forth in the record. That the Appellate Division of the Supreme Court knew that it was overruling these previous decisions and confirmatory patents may be ascertained by the following extracts which we take the liberty of setting forth in full from the opinions of the justices of the said Court:

> "The principal obstacle to an acceptance of the present construction of the patent is found in the determination of a board of arbitrators appointed in 1696 to decide a dispute between the Town of Flatlands"—from whom the City now claims as successor—"and the heirs of Elbert Elbertsen who had succeeded to the Hudde and Gerritsen title"—from whom petitioner claims a direct chain of title. "The arbitrators made a lengthy decision containing find-

ings of fact and conclusions. * * * The arbitrators adopted the description contained in the confirmatory patent from Governor Nicolls in 1667. Their decision contains the following finding: '2d. We doe find according to our best understanding that by the words above mencond in van Twillers patent (stretching in length from a Certaine Kill or Creeke coming out of the sea, and soe runs almost north into the woodlawnd) is meant only the running of the Creeke almost north, and not to run almost a north line from said kill or Creeke into the woodland.' This finding cannot be reconciled with the theory which we are about to accept * * * " (fols. 7553-7555).

" * * * A finding of such antiquity should not be lightly disregarded. Yet there is reason to believe that the arbitrators who made it were themselves misled by an erroneous translation of the patent. The confirmatory grant of 1667, from which the arbitrators took their description, is the only extant translation which interpolates the words 'and soe runs' following the reference to the kill. The insertion of these words makes it appear that it was the kill which ran northerly to the woods. Yet if these words are omitted the northerly direction may reasonably be taken to relate back to the 'stretching' of the flat from the kill. Under the circumstances the finding of the arbitrators is of such doubtful value that it cannot be allowed to prevail over the evidence supporting a contrary finding" (fols. 7555-7556).

By Lazansky, P.J. (concurring):

" * * * The translation, accepted by all in the *Gerritsen Marine Park case* (*supra*), fortified as it was by the description in the Nicolls confirmatory patent of 1667 and the finding in the arbitration of 1696, both then deemed to be accurate, readily invited the view that the westerly bounds was the Strom Kill from the sea north and, therefore, tended to justify the inference that the ocean was the southerly boundary of the land granted by the patent. This meant, of course, as urged by claimants, that the lands in dispute were within the patent of 1636.

"But the corrected translation sets a new face on the situation. * * * (fols. 7563-7564).

"* * * Thus Mill Creek was the southerly boundary. Of course, this is not by any means conclusive, nor completely convincing. * * * (fol. 7568).

"There are a number of items upon which appellants" (petitioner) "may call to sustain their view. The Dongan grant of 1685 indicates that the ocean was the southern boundary of Flatlands, which seems to be presently conceded. The various grants of Gravesend were made, all of which were bounded on the south by the ocean. In the arbitration of 1696 it was found that the western boundary of Elbertsen's (now petitioner's) "land, granted by Governor Nicolls in confirmation of his purchase from Gerritsen growing out of the original Dutch grants, joins to the eastern-most part of the Gravesend town patent which ran to the ocean. In the Nicolls patent of 1667, the description was followed by the words 'TOGETHER with all the lands, Soyles, Woods, Meadows, flatts, Pastures, Marshes, Creekes, Waters, Lakes, ffishing, Hawking, Hunting and ffowling, And all other profits, Commodities, Emoulments, and hereditaments to the said Parcell of Tract of land & premises belonging or in anywise, appertaining with their and every of their Appurtenances and of every part and parcell thereof.' This it is said, refers to the 'Broken Lands' and, at least, indicates what it was thought that the original Dutch patent granted. It will be remembered that in 1664 the Indians conveyed Barren Island or the 'Broken Lands' to Tilton and Spicer and that an heir of Spicer conveyed to Elbertsen in 1681. It appears that in 1679 Elbertsen claimed title to the Island in an action which he brought for trespass. There are also some other items which, appellants" (petitioner) "argue, indicate that the 'Broken Lands' were included within the original grant. However, whatever doubt may be thrown on the conclusion reached by the trial court by reason of these various items submitted by appellants" (petitioner), "they are not sufficient to overcome the construction placed upon the original patent adopted by the trial court, starting with the corrected description as a basis" (fols. 7577-7580).

In condemnation proceedings in New York State there are no pleadings. The procedure in the City of New York is for the Board of Estimate to pass a resolution acquiring the lands about to be condemned. This resolution is passed pursuant to the City Charter of the City of New York, Chapter 378, Laws of 1897 as amended, which is an Act of the Legislature of the State of New York.

An order is then entered by a Justice of the Supreme Court of the State of New York acquiring the title for the City, claims are then presented by the different property owners setting forth their claim of title to the property, hearings are held by a Justice of the Supreme Court and he ascertains the damage and those entitled to such damages and enters a tentative decree. Objections, which are really the first pleading in the proceeding are then filed by the property owners who object to the Court's determination.

In the instant case, one of the objections filed by the Petitioner was that the finding of the Court was contrary to the Constitution of the State of New York and the United States Constitution, and the laws and decisions of the Courts of the State of New York (pp. 91; 124; 148). After hearing the objections the Court entered a final decree. In the instant case the appeal was taken from the final decree which overruled Petitioner's objections.

The Appellate Division sustained the Trial Court, with one dissenting opinion. In the Appellate Division the Court's attention was called to the fact that the prior decision of the Court and of the Arbitrators were binding upon the City of New York, and likewise on the appeal to the Court of Appeals. This fact was emphasized in Petitioner's brief. No findings or conclusions of law were made by the Appellate Division or the Court of Appeals.

POINT I.

The decision of the Arbitrators of 1696 and the decision in the Gerritsen Marine Park Proceedings (248 App. Div. 240) became part of the petitioner's grant or title and the decision of the New York Courts reversing the arbitration and its said prior decision constituted an impairment of petitioner's contract in violation of Article I, Section 10 of the United States Constitution.

In the cases *sub judicae* the Court in taking the property which Petitioner claims belongs to it did so pursuant to a legislative enactment, *i.e.*, the New York City Charter, and pursuant to the resolutions of the then governing body of the City of New York, the Board of Estimate, and it is submitted that this case is on all fours with the case of *Muhlker* v. *N. Y. & H. R. R. Co.*, 197 U. S. 544. In that case the Railroad Company was proceeding under a statute to condemn certain property which Muhlker claimed belonged to him.

Mr. Justice McKenna at page 561, said:

> "In the case at bar there is a complete change of ruling by the Court of Appeals. The Lewis case is declared, in so far as its expressed rights of abutting property owners, to have been improvidently decided and the elevated railroad cases which were made its support, were distinguished." * * *

At page 570:

> "However, we need not go further than the present case demands. When the plaintiff acquired his title those cases were the law of New York and assured to him that his easements of light and air were secured by contract as expressed in those cases and could not be taken from him without the payment of compensation."

In the instant case to sustain Petitioner's contention we had the confirmatory Patent of Nicholls of 1667, the Findings of the Arbitrators of 1696, and the decision of the New York Courts in the Gerritsen Marine Park case which held that the Hudde and Gerritsen Patent embraced and covered the property which was taken in condemnation in these proceedings. The only reason the Petitioner did not recover in the Gerritsen Marine Park case was because it had not sufficiently proven its chain of title. That question does not arise in the instant proceedings because the Petitioner definitely and clearly proved its chain of title and the City of New York did not in any of the Courts dispute this chain of title.

The constitutional question was raised by Petitioner in its pleadings and was never waived at any time by it. If the *Muhlker* case is sound law, the decision of the Court of Appeals of New York State in the instant case must be reversed.

In the case of *Taylor* v. *Ypsilanti*, 105 U. S. 60, Mr. Justice Harlan, at page 71 quotes from the opinion of Chief Justice Taney in *Ohio Life Insurance Company* v. *Debolt*, (16 How. 416, 432), as follows:

> "'The sound and true rule is that if the contract when made is valid by the laws of the state as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligations cannot be impaired by any subsequent act of the Legislature of the state, or decisions of its courts altering the construction of the law.'"

In *Sauer* v. *New York*, 206 U. S. 536, Mr. Justice Moody, at page 549 said:

> "The plaintiff asserts that the case of *Story* v. *Elevated R. R.*, 90 N. Y. 122, decided in 1882 four years before he acquired title to the property interpreted the contract between the City of New York and the owners of the land abutting upon its streets as assur-

ing the owners of the easements of access, light and air, which could not lawfully be impaired by the erection on the street of an elevated structure designed for public travel; that he is entitled to the benefit of the contract as thus interpreted and that the judgment of the court denying him its benefits impaired its obligation. If the facts upon which this claim is based are accurately stated then the contract comes within the authority of *Muhlker* v. *Railroad Co.* 197 U. S. 544 which holds that when the Court of Appeals has once interpreted the contract existing between the land owner and the City that interpretation becomes a part of the contract upon which one acquiring land may rely; and thus any subsequent change of it to his injury impairs the obligation of the contract."

In *Louisiana* v. *Pilsbury*, 105 U. S. 278, Mr. Justice Field said at page 294:

"Whether such a construction was a sound one is not open to question in considering the validity of the bonds. The exposition given by the highest tribunal of the state must be taken as correct so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction."

In *Douglas* v. *County of Pike*, 101 U. S. 677, Mr. Justice Waite at page 687 said:

"The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment: that is to say make it prospective, but not retrospective. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

Petitioner realizes that this Court in the case of *Tidal Oil Co.* v. *Flannagan*, 263 U. S. 453, speaking through Mr. Chief Justice Taft said that it has been settled by a long line of decisions that the provisions of Section 10 Article I of the Federal Constitution protecting the obligations of a contract against state action is directed only against impairment by legislation and not by judgments of the courts, but in that case this Court pointed out that the *Muhlker* v. *N. Y. & H. R. R. Co.* 197 U. S. 544, and *Louisiana* v. *Pilsbury*, 105 U. S. 278, were cases in which a statute had been passed. That is true of the instant case. There was a statute passed that authorized the condemnation, a similar statute to the one in *Muhlker* v. *N. Y. & H. R. R. Co.* Petitioner acquired title relying upon the 1696 Arbitration proceedings, which were an integral part of its title. Petitioner has spent large sums of money as evidenced by the record herein, in perfecting its claim in the instant proceedings, relying not only on the Arbitration proceedings of 1696, but upon the decisions of the New York State Court, which held that the Hudde and Gerritsen Patent covered the lands condemned by the City of New York in these proceedings.

The complete reversal by the New York Courts of their decision, it is respectfully submitted, is an impairment of petitioner's contract and of its title.

POINT II.

The legal questions involved are of great importance

Aside from the amount of money involved in these proceedings, which is very large and estimated to be from Seven Hundred Thousand to a Million and one-half Dollars, the legal question of whether or not the complete reversal of a State Court of its decisions affecting real property, and which decisions have been acted upon has

not been squarely passed upon by the Supreme Court since the decisions cited in Point I of this brief.

Chief Justice Taft in the case of *Tidal Oil Company* v. *Flannagan, supra,* indicated that this Court, unless a statute was directly involved, would not interfere with the decisions of a State Court which reversed prior decisions and affected contrasts thereby.

In the *Muhlker* v. *N. Y. & H. R. R. Co.* case, *supra,* the Statute was one which merely authorized condemnation proceedings. The Statute, by its wording, did not in any way reverse or change the decisions of the New York Court that had been rendered involving the right to easements of access, light and air. It was the decision of the New York Courts, acting pursuant to the Statute in new condemnation proceedings, that reversed the previous decisions of the said Courts. This is equally true in the instant case. It is submitted, however, that the Arbitration proceedings and the decision of the New York Courts in the Gerritsen Marine Park proceeding actually became part of the contract and the change of the decision reversing these prior pronouncements of the Courts under the Statute authorizing the condemnation, actually impaired petitioner's contractual rights.

This Court in reading the opinion of the Trial Justice will see that the said Justice was swayed by extraneous matters. His statement that the petitioner claimed property of the value of Ten Million Dollars was a gross exaggeration, if the values as established on property that was actually paid for by the City is a criterion. On such basis the total amount involved is approximately One Million five hundred thousand dollars, upon which there are taxes and assessments of over Seven Hundred Thousand Dollars due to the City of New York.

The Petitioner has definitely established a claim, if this Court should agree with its contentions, to a 93/640th part of that amount of money, which is a far cry from Ten Million Dollars. Much publicity was given to the trial court's decision in the New York newspapers before the case reached the Appellate Division of the Supreme Court.

The petitioner is calling these facts to the Court's attention because the Trial Court very obviously erred in its estimate of the amount of money that was involved in Petitioner's claim and we are doing so so that there may be no misapprehension as to the amount in controversy.

POINT III.

It is respectfully submitted that the writ of certiorari should be allowed to review the decision of the Court of Appeals of New York State in the instant proceedings and that upon such review the decision of the said New York Court of Appeals should be reversed.

Respectfully submitted,

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